Abdul Salam bin Husin v Majlis Angkatan Tentera & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6-21-218 OF 1989
MOHD SAARI J
12 NOVEMBER 1999

Administrative Law *— Rights and liabilities of public servants — Declaration — Lieutenant's commission with Royal Malaysian Air Force cancelled — Whether right of being heard should be given — Armed Forces Act 1972 s 9 — Federal Constitution arts 132(1) & 135*

The plaintiff's commission as a a lieutenant with the Royal Malaysian Air Force was cancelled with effect from 31 May 1996. The plaintiff applied for a declaration that the purported cancellation of the plaintiff's commission is null and void. The main complaint of the plaintiff was that his service in the armed forces was terminated without right of being heard being given to him.

Held, dismissing the application:

From the reading of art 132(1) together with art 135 of the Federal Constitution, the framers of the Constitution had deliberately omitted the armed forces for purpose of conferring right of being heard to members of public service (see p 149G–H); *Hjh Halimatussaadiah bte Hj Kamaruddin v PSC Malaysia & Anor* [1994] 3 MLJ 61 distinguished. The plaintiff is governed by the Armed Forces Act 1972 and the court has no jurisdiction to inquire into circumstances under which he ceased to hold office. The purported cancellation of the plaintiff's commission by Yang di-Pertuan Agong under s 9 of the Act is valid in law (see p 150E–F).

[Bahasa Malaysia summary

Pentauliahan plaintif sebagai seorang leftenan dengan Tentera Udara Di Raja Malaysia telah dibatalkan berkuatkuasa daripada 31 Mei 1996. Plaintif telah memohon satu deklarasi bahawa pembatalan tauliah plaintif tersebut adalah batal dan tak sah. Aduan utama plaintif adalah bahawa perkhidmatan beliau di dalam angkatan tentera telah ditamatkan tanpa hak untuk didengari diberikan kepada beliau.

Diputuskan, menolak permohonan tersebut:

Setelah membaca perkara 132(1) bersama dengan perkara 135 Perlembagaan Persekutuan, pembuat Perlembagaan telah dengan sengaja meninggalkan angkatan tentera bagi tujuan memberikan hak untuk didengari kepada ahli-ahli perkhidmatan awam (lihat ms 149G–H); *Hjh Halimatussaadiah bte Hj Kamaruddin v PSC Malaysia & Anor* [1994] 3 MLJ 61 dibeza. Plaintif dikawal oleh Akta Angkatan Tentera 1972 dan mahkamah tiada bidang kuasa untuk menyiasat keadaan-keadaan di mana beliau telah diberhentikan daripada tugas beliau. Pembatalan tauliah plaintif oleh Yang di-Pertuan Agong di

bawah s 9 Akta tersebut adalah sah di sisi undang-undang (lihat ms 150E–F).] A

Notes

For cases on dismissal of public servants, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 519–543. B

Cases referred to

Hjh Halimatussaadiah bte Hj Kamaruddin v PSC Malaysia & Anor [1994] 3 MLJ 61 (distd)
Tufnell, Re (1876) 3 Ch D 164 (refd) C

Legislation referred to

Armed Forces Act 1972 s 9
Federal Constitution art 132(1), 135

Karpal Singh (*Karpal Singh & Co*) for the plaintiff. D
Mahamad Naser bin Disa (*Zaraihan bte Shaari* with him) (Attorney General's Chambers) for the defendants.

Mohd Saari J: In this suit, plaintiff claims the following relief:

(a) a declaration that the purported cancellation of the plaintiff's commission with effect from 31 May 1986 vide letter dated 7 May 1986 is null and void and of no legal effect; E

(b) a declaration that the plaintiff remains a lieutenant in the Royal Malaysian Air Force with no loss of seniority and is entitled to all salaries, emoluments and benefits due to him as such;

(c) damages; F

(d) an account be taken of all the salaries, emoluments and benefits due to the plaintiff;

(e) interests (on adjudged sum till date of full satisfaction);

(f) costs; and

(g) such further or other relief deemed fit and proper by this honourable court. G

Background

The plaintiff was appointed as a member of the armed forces on 1 July 1980. He was commissioned as second lieutenant (Udara) on 11 April 1981. After completing a course in logistic at Institute Teknologi Udara, TUDM Kinrara in March 1982, he was appointed as senior logistic officer at Pusat Pertahanan Udara Pertama TUDM Butterworth. On 11 April 1985, he was promoted to lieutenant (Udara). H

The armed forces council which was responsible for the administration of the armed forces convened it's 249th meeting on 27 March 1986. At the said meeting, it was decided to recommend to the Yang di Pertuan Agong the cancellation of the plaintiffs commission as lieutenant (Udara) logistic. Subsequently, by letter dated 7 May 1986, the plaintiff was informed that I

A his commission as lieutenant in the Royal Malaysian Air Force was cancelled pursuant to s 9 of the Armed Forces Act 1972.

The main complaint of the plaintiff was that his service in the armed forces was terminated without right of being heard being given to him.

The issue for determination is whether the purported cancellation of
B the plaintiff's commission is valid.

For the plaintiff, it is submitted that the decision making process leading to the cancellation of the plaintiff's commission was fatally flawed on the premise that the first defendant had breached the rules of natural justice by not affording the plaintiff a hearing before any recommendation
C was made to Yang di Pertuan Agong. The learned counsel relied on the case of *Hjh Halimatussaadiah bte Hj Kamaruddin v PSC Malaysia & Anor* [1994] 3 MLJ 61.

In that case, the court is concerned with question of whether the respondent (PSC) had acted fairly and properly against the appellant giving her every opportunity of being heard. In short, whether there was a breach
D of rule of natural justice.

At this juncture, it is pertinent to advert to the relevant part of Federal Constitution namely arts 132(1) and 135:

> 132 (1) For the purpose of this Constitution, the public services are —
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> E
> (a) the armed forces;
> (b) the judicial and legal service;
> (c) the general public service of the Federation;
> (d) the public force;
> (e) (repealed);
> (f) the joint public services mentioned in Article 133;
> F
> (g) the public service of each State; and
> (h) the education service.
>
> 135 (1) No member of any of the services mentioned in para (b) to (h) of cl (1) of Article 132 shall dismissed or reduced in rank by any authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank; ...
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> G 135 (2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard. (Emphasis added.)

From my reading of art 132 (1) together with art 135 of the Federal Constitution, clearly the framers of the Constitution had deliberately
H omitted the armed forces for purpose of conferring right of being heard to members of public service. Hence, the ratio decidendi in *Halimatusaadiah*'s case has no application to the present case.

Next, I turn to the defendants' case. For purpose of present case, the defendants rely on the gazette notification No 5438 published on 28 August 1986 which is reproduced as stated below:

I

> No 5438
>
> Adalah disiarkan untuk pengetahuan umum bahawa Duli Yang Maha Mulia Seri Paduka Baginda Yang di Pertuan Agong dengan limpah kurnia Baginda

telah berkenan supaya pegawai-pegawai berikut diberhentikan dari perkhidmatan Angkatan Tentera di bawah s 9 Akta Angkatan Tentera 1972 mulai tarikh-tarikh yang dinyatakan.

Nama	Tarikh mulai
Cawangan Juruterbang — (not applicable)	
Cawangan Lojistik — Leftenan (Udara) Abdul Salam bin Husin (371318)	1 Jun 1986

Here, it is significant to note that the Yang di Pertuan Agong exercised his powers under s 9 of the Armed Forces Act 1972 which Act is modelled on UK law. Section 9 states:

> The Yang di-Pertuan Agong may on the recommendation of the Armed Forces Council at any time without assigning any reason thereof cancel any commission granted under the provisions of this Part.

On the power of this court to intervene, the point is well illustrated in the case of *Re Tufnell* (1876) 3 Ch D 164. In that case, the suppliant, DR TJ Tufnell was in 1846 a staff assistant surgeon in the army and was in charge of military provost prison at Dublin. In 1984, he was deprived of the medical charge of the prison and compulsorily retired on half pay. Held: (1) that as military officer he was subject to rules and regulations of the service, and the court had no jurisdiction on a petition of right or any other proceeding to inquire into the circumstances under which he ceased to hold office; (2) that the office, like others in the army was only *tenable durante bene placito*.

The plaintiff, as here, is governed by the Armed Forces Act 1972 and the court has no jurisdiction to inquire into circumstances under which he ceased to hold office. That being so, it is my finding that the purported cancellation of the plaintiff's commission by Yang di-Pertuan Agong under s 9 of the said Act is valid in law.

In the premise and for reasons given, the writ and statement of claim is dismissed with cost.

Application dismissed.

Reported by Benjamin Yong